

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Fox Sports Net Ohio, LLC)
)
v.)
)
Massillon Cable TV, Inc.)

ORDER ON REVIEW

Adopted: November 18, 2010

Released: November 18, 2010

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this *Order*, we grant the Petition for *De Novo* Review¹ filed by Fox Sports Net Ohio, LLC (“FSN-Ohio”)² seeking review of an award issued by an independent arbitrator pursuant to a condition in the *News Corp.-Hughes Order*.³ The *Petition* stems from a dispute over the terms and conditions for carriage of certain regional sports network (“RSN”) programming by Massillon Cable TV, Inc. (“Massillon”), an Ohio cable operator. Massillon filed an Opposition to the *Petition*,⁴ to which FSN-Ohio replied.⁵ As set forth in greater detail below, we conclude, consistent with Commission precedent,⁶

¹ *Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, Fox Sports Net Ohio, LLC’s Petition for *De Novo* Review of Arbitration Award (filed September 21, 2007) (“*Petition for De Novo Review*” or “*Petition*”).

² FSN-Ohio is a regional sports network and wholly-owned subsidiary of The News Corporation, Ltd. (“News Corp.”), and owns the rights to distribute certain professional sports programming to cable systems in the areas served by Massillon Cable TV, Inc. *Massillon Cable TV, Inc., Claimant, v. Fox Sports Net Ohio, LLC, Respondent*, Case No. 71 472 E 00656 06, Award (September 12, 2007), at 1 (“*Award*”). Prior to 2005, FSN-Ohio was operated by SportsChannel Ohio Associates (“SportsChannel Ohio”), a subsidiary of Rainbow Media Holdings, Inc. *Petition* at 2-3.

³ *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee*, 19 FCC Rcd 473, 552-555, ¶¶ 172-177; *id.* at 677-679, Appendix F, Condition III (2004) (“*News Corp.-Hughes Order*”).

⁴ Massillon Cable TV, Inc.’s Opposition to Petition of Fox Sports Net Ohio, LLC for *De Novo* Review of Arbitration Award and Opposition to Request for Permit-But-Disclose Designation (filed October 15, 2007) (“*Massillon Opposition*”).

⁵ Fox Sports Net Ohio, LLC’s Reply to Opposition of Massillon Cable TV, Inc. (filed October 25, 2007) (“*FSN-Ohio Reply*”). On March 5, 2010, Massillon filed a motion to dismiss FSN-Ohio’s petition on the basis that the parties had executed a new affiliation agreement, thus rendering moot the matter in controversy. *Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, Motion to Dismiss as Moot Petition of Fox Sports Net Ohio, LLC for *De Novo* Review of Arbitration Award (filed March 5, 2010); *see also* Fox Sports Net Ohio, LLC’s Opposition to Motion of Massillon Cable TV, Inc. to Dismiss Petition for *De Novo* Review of Arbitration Award (filed March 10, 2010); Reply to Opposition to Motion to Dismiss as Moot Petition of Fox Sports Net Ohio, LLC for *De Novo* Review of Arbitration Award (filed March 12, 2010). Our decision to grant FSN-Ohio’s petition for *de novo* review renders moot Massillon’s motion to dismiss.

⁶ *See infra* note 61.

that the condition established in the *News Corp.-Hughes Order* does not permit the arbitration of disputes regarding the terms and conditions of ongoing carriage agreements.⁷ In particular, we conclude that the condition limits the arbitration remedy to disputes concerning new contracts, specifically, new contracts associated with a renewal of pre-existing rights after expiration of a previous contract, or new contracts associated with first-time requests for carriage. Accordingly, we vacate the arbitration award in its entirety, including: (i) the arbitrator's ruling that Massillon's final offer more closely approximates the fair market value of the rights to carry FSN-Ohio; and (ii) the arbitrator's directive that FSN-Ohio pay Massillon for all costs and fees resulting from its alleged "unreasonable" conduct during the arbitration.

II. BACKGROUND

2. In the *News Corp.-Hughes Order*, the Commission approved the acquisition by the News Corporation of a *de facto* controlling interest in the direct broadcast satellite firm DIRECTV Group, Inc. ("DIRECTV"), subject to certain conditions.⁸ In approving the transaction, the Commission found, among other things, that the combination of News Corp.'s RSN programming assets and DIRECTV's nationwide distribution platform could result in "an across-the-board . . . price increase . . . for carriage of [News Corp.-affiliated] RSN programming [by multichannel video programming distributors ("MVPDs")] through the more frequent use of threats of withholding or actual withholding of RSN programming during a period of temporary foreclosure."⁹ The Commission further noted a secondary public interest harm that MVPD subscribers would be "deprived of programming that is highly desired during such a period."¹⁰ To mitigate these concerns, the Commission crafted a condition that allowed an aggrieved MVPD to invoke commercial arbitration to resolve a dispute with News Corp. over the terms and conditions of RSN carriage.¹¹ The arbitration condition was intended to prevent News Corp. from exercising its increased market power to force rival MVPDs either to accept inordinate affiliate fee increases and/or other unwanted programming concessions, or potentially forgo critical content, thus ceding a competitive advantage to DIRECTV. According to the Commission, these harms were inadequately addressed by its existing program access rules.¹²

3. Pursuant to the RSN condition, in October 2006, Massillon filed with the American Arbitration Association ("AAA") a demand for commercial arbitration of a dispute with FSN-Ohio regarding the terms and conditions of carriage of RSN programming pursuant to an existing contract.¹³ In

⁷ The relevant condition in *News Corp.-Hughes Order* provides, among other things, that "[f]ollowing the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify News Corp. . . . that it intends to request commercial arbitration to determine the terms of the new affiliation agreement." *News Corp.-Hughes Order*, 19 FCC Rcd at 677, Appendix F, Condition III.

⁸ In 2008, News Corp. transferred its interest in DIRECTV to Liberty Media Corporation. *News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, 23 FCC Rcd 3265 (2008) ("*Liberty-DIRECTV Order*"). Consequently, News Corp. was relieved of some, but not all, of the conditions that the Commission adopted in the *News Corp.-Hughes Order*. On June 15, 2009, the Commission removed the remaining conditions, including the arbitration condition at issue here. *General Motors Corporation, Hughes Electronics Corp., Transferors, and the News Corp., Ltd., Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 24 FCC Rcd 8674 (2009) ("*Condition Removal Order*"). The Commission stated, however, that it would continue to apply the condition to already existing arbitrations in which a formal demand or notice for arbitration had been made, including the instant dispute. *Id.* at 8683, ¶ 16.

⁹ *News Corp.-Hughes Order*, 19 FCC Rcd at 552, ¶ 172.

¹⁰ *Id.*

¹¹ *Id.* at 552-555, ¶¶ 172-177.

¹² *Id.* at 547, ¶ 162.

¹³ *Petition* at 4-5.

February 2007, FSN-Ohio filed a motion to dismiss the matter on jurisdictional grounds.¹⁴ In April 2007, the arbitrator denied with prejudice FSN-Ohio's motion and directed the parties to proceed with arbitration.¹⁵ FSN-Ohio subsequently declined to participate in the arbitration beyond contesting jurisdiction; thus, it did not submit a final offer for consideration.¹⁶ Nevertheless, the arbitrator agreed to hear evidence from Massillon on issues related to the fair market value of the rights to carry FSN-Ohio.¹⁷ After conducting a hearing in which only Massillon participated, the arbitrator, in September 2007, issued an award in favor of Massillon.¹⁸ Among other things, the arbitrator concluded that the final offer submitted by Massillon "most closely" approximated the fair market value of the programming carriage rights at issue.¹⁹ In addition, the arbitrator directed FSN-Ohio to reimburse Massillon for costs and fees, including excess affiliation fees, plus interest, as a consequence of FSN-Ohio's alleged "unreasonable" conduct during the course of the arbitration.²⁰

4. *The Program Access Dispute.* This dispute arose from a 1998 affiliation agreement between Massillon and FSN-Ohio's predecessor-in-interest, SportsChannel Ohio, that provided for Massillon's carriage of certain RSN programming.²¹ As part of its contractual obligations, FSN-Ohio agreed to provide, among other programming, a yearly package of Cleveland Indians baseball games in exchange for Massillon's payment of a specified per-subscriber fee.²² In 2001, the parties amended the agreement to include additional Cleveland Indians games for an increased fee per subscriber.²³ In 2004, the parties extended their agreement through December 31, 2008 and further increased the program affiliation rates.²⁴ Following the end of the 2005 baseball season, FSN-Ohio notified Massillon that it had lost the rights to carry the Cleveland Indians games and that its RSN programming thus would no longer include such events.²⁵ [REDACTED]²⁶ The parties engaged in discussions regarding the price, terms,

¹⁴ See Award at 3-4.

¹⁵ *Id.* at 4. Among other things, the arbitrator found that: (i) the parties' carriage agreement is arbitrable pursuant to the procedures in the *News Corp.-Hughes Order*; (ii) the *News Corp.-Hughes Order* mandates arbitration of the instant dispute over the terms and conditions of carriage, in particular, the pricing of RSN programming provided by FSN-Ohio; and (iii) an adjustment, if any, of the per-subscriber rate must be determined pursuant to the arbitration rules established in the *News Corp.-Hughes Order*. *Id.*

¹⁶ *Petition* at 5-7.

¹⁷ *Id.*

¹⁸ See Award. After the arbitrator denied FSN-Ohio's motion to dismiss, FSN-Ohio filed with the Commission a petition for *de novo* review seeking interlocutory review of the arbitrator's jurisdictional ruling and a stay of the arbitration proceedings. FSN-Ohio contemporaneously requested that the arbitrator's interim order denying FSN-Ohio's motion to dismiss be renamed "Interim Award," and that the arbitrator stay the effectiveness of her jurisdictional ruling. The arbitrator denied FSN-Ohio's requests. *Petition* at 5-7.

¹⁹ Award at 7. Pursuant to the RSN condition, an arbitrator must choose the final offer of the party that "most closely approximates the fair market value of the programming carriage rights at issue." See *News Corp.-Hughes Order*, 19 FCC Rcd at 678, Appendix F, Condition III; see also *infra* note 28 (discussing the arbitrator's rationale for selecting Massillon's proposed agreement absent an alternative final offer).

²⁰ Award at 7.

²¹ *Petition* at 2.

²² Award at 3.

²³ *Id.*

²⁴ *Id.*; *Petition* at 2.

²⁵ See Award at 3; *Petition* at 3.

²⁶ Award at 3.

and conditions for carriage of the FSN service; however, the negotiations failed to produce a mutually acceptable set of terms for the programming. On October 25, 2006, Massillon filed with the AAA its demand for arbitration.²⁷

5. *The Arbitrator's Award.* On the basis of evidence and oral testimony put forth by Massillon, the arbitrator, on September 12, 2007, rendered an award in favor of Massillon. In so doing, the arbitrator found that both the price and nonprice terms and conditions of Massillon's final offer are a close approximation of the fair market value of the rights to carry FSN-Ohio.²⁸ The arbitrator further concluded that FSN-Ohio had engaged in unreasonable conduct by: (i) [REDACTED];²⁹ (ii) refusing to submit a final offer after the arbitrator denied its motion to dismiss and ruled the matter arbitrable;³⁰ and (iii) refusing to participate in the arbitration.³¹ Consequently, the arbitrator directed FSN-Ohio to pay Massillon for: (i) [REDACTED];³² (ii) Massillon's legal costs as of the date of the *Award*; and (iii) Massillon's economic consultant costs as of the date of the *Award*, including expert testimony at the hearings.³³ In addition, the arbitrator directed FSN-Ohio to pay all administrative fees of the AAA.³⁴

6. *Petition for Review.* FSN-Ohio contends that the Commission should reverse the *Award* because both the language and intent of the RSN condition preclude arbitration of disputes arising from ongoing carriage agreements such as the one at issue here.³⁵ FSN-Ohio asserts that, because a party can be required to arbitrate only that which it has agreed to arbitrate, Massillon bears the burden to demonstrate that an agreement to arbitrate exists and that the dispute comes within the scope of such

²⁷ *Id.*

²⁸ *Id.* at 5-6. In particular, the arbitrator found that:

neither FSN's failure to move forward, nor its failure to present its own final offer does not impair [sic] my ability to make the decisions required by the [*News Corp.-Hughes Order*], because Massillon has provided thoroughly credible, highly substantiated, well-supported, and well-reasoned testimony that: (i) its final offer closely approximates the fair market value of the programming at issue; and (ii) the final offer will permit News Corp. to recover a reasonable share of the costs of acquiring the programming at issue.

Id. at 7. The arbitrator further ordered that the final offer submitted by Massillon "shall, as of the date of [the] *Award*, become the affiliation agreement between the [p]arties and shall be retroactive to January 1, 2006." *Id.* The revised agreement expired on December 31, 2009. *FSN Petition* at 9.

²⁹ *Award* at 7.

³⁰ *Id.*

³¹ *Id.* The arbitrator noted that FSN-Ohio declined to participate in the arbitration after: (i) Massillon agreed to FSN-Ohio's conditions regarding its right to appeal the issue of arbitrability to the Commission; and (ii) after entry of interim orders holding that "neither side, by participating in the arbitration or the scheduling details . . . , waives any rights under the law or the [*News Corp.-Hughes Order*]." *Id.* The arbitrator concluded that FSN-Ohio's refusal to submit a final offer and participate in the arbitration violated the *News Corp.-Hughes Order*. *Id.*

³² *Id.* at 7-8. Although the *Award* does not explain the significance of this date, it is reasonable to assume that the date represents a proxy for the point in time when the FSN service ceased carriage of the Cleveland Indians games. *See Petition* at 13-14.

³³ *Award* at 8. The arbitrator further determined that if, in the implementation of the *Award*, Massillon were to incur additional costs and expenses, FSN-Ohio must pay all such additional amounts paid by Massillon after the date of the *Award*. *Id.*

³⁴ *Id.*

³⁵ *See Petition* at 11-17.

agreement.³⁶ Moreover, FSN-Ohio argues that the *Award*, if permitted to stand, would discourage settlement negotiations while expanding the scope and burden of the arbitration condition for RSN programmers and the Commission.³⁷ Finally, FSN-Ohio contends that, because the dispute was not arbitrable in the first instance, the arbitrator lacked jurisdiction to impose any fees and costs against it.³⁸ Apart from that, FSN-Ohio claims, the arbitrator had no rational basis for such assessment of fees and costs because FSN-Ohio's decision not to participate in the arbitration was intended to lessen the burden on its opponent and the arbitrator and, thus, did not constitute "unreasonable" conduct.³⁹

7. Massillon disputes all of those claims, asserting that both the text of the condition and its underlying policy permit arbitration in cases where parties are subject to an ongoing carriage agreement.⁴⁰ Massillon contends that, because the Commission established the arbitration remedy to protect the public from the increased market power resulting from News Corp.'s acquisition of DIRECTV, adopting FSN-Ohio's narrow interpretation of the RSN condition would deprive MVPDs of any meaningful protection and allow News Corp. to accelerate predatory conduct.⁴¹ Massillon asserts that there is a presumption of arbitrability in federal case law and therefore any doubts concerning the scope of an arbitration clause must be resolved in favor of arbitration.⁴² Thus, it maintains, FSN-Ohio bears the burden of proving that the instant dispute is not arbitrable, a burden FSN-Ohio has failed to satisfy.⁴³ Finally, Massillon argues that, because FSN-Ohio was compelled under the *News Corp.-Hughes Order* to participate in the arbitration, the arbitrator's assessment of fees and costs on FSN-Ohio was justified given FSN's unreasonable conduct during the arbitration.⁴⁴

³⁶ *Id.* at 10.

³⁷ *Id.* at 17-20. Massillon claims that its request for arbitration was prompted by an impasse in negotiations over the price, terms, and conditions of a new affiliation agreement demanded by FSN-Ohio. *See id.* at 18 (*citing* Massillon Response Brief at 25). FSN-Ohio argues that it was Massillon, not FSN-Ohio, that expressed dissatisfaction with the agreement and sought to make adjustments based upon a change in programming. FSN-Ohio asserts that while it simply could have insisted upon Massillon's performance of its contractual obligations, it instead entered into discussions with Massillon to explore alternative carriage arrangements more suitable to Massillon. *Id.* at 18

³⁸ *Id.* at 20-23.

³⁹ *Id.*

⁴⁰ *Massillon Opposition* at 5-12.

⁴¹ *Id.* at 24.

⁴² *Id.* at 15-17.

⁴³ *Id.* at 17.

⁴⁴ *Id.* at 17-20.

III. DISCUSSION

8. Based upon our *de novo* review of the record in this proceeding,⁴⁵ we find that this dispute regarding the terms and conditions of carriage of News Corp.-affiliated RSN programming was not arbitrable under the *News Corp.-Hughes Order*. Because we find that the arbitrator lacked jurisdiction to decide this matter in the first instance, we conclude that the arbitrator also lacked authority to assess fees and costs against FSN-Ohio for its alleged “unreasonable” conduct during the arbitration. As discussed below, we find that neither the plain text of the condition, nor its underlying policy, permits arbitration of disputes arising under ongoing carriage agreements. In light of our finding on this threshold question, we vacate: (i) the arbitrator’s finding that Massillon’s final offer “most closely” approximates the fair market value of the programming carriage rights at issue; and (ii) the arbitrator’s imposition of costs and fees against FSN-Ohio. Accordingly, we direct Massillon, within thirty days of the effective date of this *Order*, to reimburse FSN-Ohio for the following costs and fees paid to Massillon in satisfaction of the *Award*: (i) any excess affiliation fees, including interest, paid by FSN-Ohio;⁴⁶ (ii) Massillon’s legal costs as of the date of the *Award*;⁴⁷ and (iii) Massillon’s economic consultant costs as of the date of the *Award*, including the costs of expert testimony at the hearings.⁴⁸ We further require that Massillon reimburse FSN-Ohio for the amount representing Massillon’s portion of the administrative fees of the AAA that FSN-Ohio was compelled to pay under the *Award*.⁴⁹

9. The threshold question at issue in this dispute is whether Massillon properly invoked the arbitration condition under the terms of the *News Corp.-Hughes Order* before its existing carriage agreement with FSN-Ohio had expired. We answer this question in the negative. In particular, we conclude that the language, design, and intent of the RSN condition limit the arbitration remedy to disputes concerning new contracts, namely, new contracts associated with a renewal of pre-existing rights after expiration of a previous contract, or new contracts resulting from first-time requests for carriage.⁵⁰

10. The relevant text of the *News Corp.-Hughes Order* permits an aggrieved MVPD to submit a dispute with News Corp. to commercial arbitration “[w]hen negotiations fail to produce a mutually acceptable set of price, terms and conditions for carriage of [an RSN].”⁵¹ The condition further provides that aggrieved MVPDs may pursue this remedy “[f]ollowing the expiration of any existing

⁴⁵ The *News Corp.-Hughes Order* provides, in relevant part, that “[a] party aggrieved by the arbitrator’s award may file with the Commission a petition seeking *de novo* review of the award.” *News Corp.-Hughes Order*, 19 FCC Red at 679, Appendix F, Condition III. Pursuant to this provision, the Commission may not hold another evidentiary hearing or allow the parties to adduce new evidence, but may depart from the arbitrator’s findings based on its review of the existing evidentiary record. In light of our broad authority under the *News Corp.-Hughes Order* to review both the legal and factual conclusions of an independent arbitrator, we reject Massillon’s assertion that our findings in this case must overcome a presumption of arbitrability. See *Massillon Opposition* at 15 (“[A]ll doubts concerning the scope of an arbitration clause shall be resolved in favor of arbitration.”); see also *id.* at 16-17. We further note that, in contrast to an arbitration clause agreed upon by private parties in a contract negotiation, the arbitration provision at issue here was adopted by the Commission, thus making the Commission uniquely qualified to interpret its scope. See *Comcast Corp. v. FCC*, 526 F.3d 763, 767 n.1 (D.C.Cir. 2008) (stating court “normally defers to an agency’s interpretation of ambiguity in its own decisions”).

⁴⁶ See *Award* at 7, ¶ 5.

⁴⁷ *Id.* at 8, ¶ 5.b. This includes any “additional costs and expenses” incurred by Massillon after the date of the *Award* that FSN-Ohio has paid. *Id.* at 8, ¶ 5.d.

⁴⁸ *Id.* at 8, ¶ 5.c.

⁴⁹ *Id.* at 8, ¶ 7.

⁵⁰ See *News Corp.-Hughes Order*, 19 FCC Red at 677, Appendix F, Condition III, 2nd bullet.

⁵¹ *Id.* at 553, 677, Appendix F, Condition III.

contract, or 90 days after a first time request for carriage.”⁵² Thus, the plain language of the condition specifies only two circumstances in which MVPDs may avail themselves of the arbitration remedy, both of which contemplate that there is no effective contract in effect between the parties.⁵³ Where, as here, a dispute arises from an attempt to renegotiate rights under an existing contract, the remedy may not be invoked. The *News Corp.-Hughes Order* does not provide for the arbitration of disputes except under these narrow confines.⁵⁴ By contrast, a dispute arising in negotiations to renew a previous contract for a

⁵² As noted above, the condition reads, in pertinent part, that “[f]ollowing the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify News Corp. . . . that it intends to request commercial arbitration to determine the terms of the new affiliation agreement.” *Id.* at 677, Appendix F, Condition III. We note that the *Award* does not identify any specific provision of the *News Corp.-Hughes Order* that expressly authorizes the arbitration of disputes during the term of an ongoing, binding carriage agreement. *See Award*; *see also Massillon Cable TV, Inc. and Fox Sports Net Ohio, LLC*, Interim Order (April 26, 2007) (“*Interim Order*”). Rather, the arbitrator states in conclusory fashion that the *News Corp.-Hughes Order* “mandates the arbitration of the instant dispute over the terms and conditions of carriage of the Agreement (specifically, the pricing of regional sports network programming provided by [FSN-Ohio] to [Massillon]),” and further finds that “an adjustment, if any, of the [agreement’s] per-subscriber rate must be determined pursuant to rules of arbitration set forth in the [*News Corp.-Hughes Order*].” *Award* at 4 (*citing Interim Order*). The arbitrator acknowledged that “[t]he purpose of arbitration . . . is . . . ‘[t]o reduce the incentives and opportunities for News Corp. to remove programming and thus eliminate additional credibility of programming withdrawal as a bargaining tool’” *Id.* at 1-2 (*citing News Corp.-Hughes Order*). However, the arbitrator provided no explanation of how her expansive interpretation of the condition could be squared with its underlying purpose.

⁵³ Our interpretation is also supported by the overall design of the condition. *See News Corp.-Hughes Order*, 19 FCC Rcd at 677, Appendix F, Condition III (“[t]he MVPD’s formal demand for arbitration . . . may be filed . . . no earlier than the fifteenth business day *after the expiration of the RSN contract* and no later than the end of the twentieth business day *following such expiration*”) (emphasis added); *id.* at 678 (providing that, upon resolution of an arbitrable dispute, “to the extent practicable, the terms of the new affiliation agreement will become retroactive to the *expiration date of the previous affiliation agreement*”) (emphasis added).

⁵⁴ Contrary to Massillon’s assertions, *Massillon Opposition* at 8-12, the first bullet under the heading “Commercial Arbitration Remedy” in the RSN arbitration condition does not provide an MVPD an absolute right to submit any type of dispute involving a News Corp.-affiliated RSN (including mid-contract disputes) to arbitration. *See News Corp.-Hughes Order*, 19 FCC Rcd at 677, Appendix F, Condition III. Although the first bullet of the RSN condition generally states that “[a]n aggrieved MVPD may submit a dispute with News Corp. over the terms and conditions of carriage of RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN,” this requirement merely establishes that disputes between an MVPD and a News Corp.-affiliated RSN generally may be submitted to arbitration, subject to the procedures and limitations set forth in the subsequent bullets, including limitations on when the remedy may be invoked. *Id.* Thus, the general language on which Massillon relies is qualified by the express limitations on when the arbitration remedy may be invoked, which, as discussed below, clearly contemplate no effective contract between the parties. Massillon further argues that, unlike the RSN arbitration condition, the condition governing arbitration of retransmission consent disputes adopted in the *News Corp.-Hughes Order* explicitly states that “[t]he commercial arbitration condition commences following the expiration of any existing retransmission consent agreement.” *Massillon Opposition* at 13 (quoting *News Corp.-Hughes Order*, 19 FCC Rcd at 680, Appendix F, Condition IV). According to Massillon, this demonstrates that the Commission knew how to draft a condition that would limit an MVPD’s right to arbitration until after a contract has expired, yet it did not use this specific language in the RSN arbitration condition. *See id.* at 12-15. We find this argument, based on the differences between the language used in the RSN arbitration condition and the retransmission consent arbitration condition, to be unpersuasive. Even assuming that the first bullet of the RSN arbitration condition is less explicit than the one contained in the retransmission consent arbitration condition, Massillon’s argument ignores the plain language of the RSN arbitration condition which expressly limits an MVPD’s right to arbitration to two circumstances -- “[f]ollowing the expiration of any existing contract, or 90 days after a first time request for carriage” -- both of which contemplate that there is no effective contract in effect between the parties. *See supra* ¶ 10. As indicated above, those specific limitations qualify the general language on which Massillon relies. Moreover, the general language in the RSN arbitration condition does not provide a basis for expanding the RSN arbitration remedy in a manner that goes beyond the specific harms the condition was

period beyond its existing term would be arbitrable.⁵⁵ Preserving this distinction ensures that the arbitration condition will serve its intended purpose without transforming every contract dispute under a carriage agreement into a matter to be arbitrated with potential *de novo* review by the Commission.⁵⁶

11. Our interpretation of the condition is consistent with the theory of harm on which the arbitration remedy was fashioned. In particular, as noted above, the condition was intended principally to address concerns regarding News Corp.'s potential incentive and ability to temporarily withhold, or threaten to withhold, access to affiliated RSN programming in an attempt to exercise leverage over the terms of carriage.⁵⁷ Because, in this case, the parties' rights and obligations regarding carriage of the FSN service were governed by an existing affiliation agreement, the competitive harm that formed the basis for the arbitration remedy in the *News Corp.-Hughes Order* – e.g., the potential for News Corp. to temporarily withhold popular RSN programming to gain leverage in a contract negotiation – could not occur. That is, FSN-Ohio was already obligated under the terms of an existing contract to permit carriage of its affiliated RSN through 2008, when the contract was set to expire. Contrary to Massillon's claims,⁵⁸ therefore, this dispute does not present a situation where "negotiations fail[ed] to produce a mutually acceptable set of price, terms and conditions for [RSN carriage]," as contemplated in the *News Corp.-Hughes Order*, but rather, a situation where terms and conditions that were once agreed upon and duly executed have ceased to be acceptable to one of the parties.⁵⁹ What rights Massillon may have under the existing contract under the current factual circumstances are a matter of contract interpretation under applicable contract law. The arbitration condition was narrowly tailored to remedy the potential harm identified in the *News Corp.-Hughes Order*; the Commission did not intend to afford an alternative forum for the resolution of any contractual dispute that may arise during the life of an RSN carriage agreement.⁶⁰ This reading of the condition is consistent with past Commission interpretations of the arbitration remedy

intended to address, i.e., News Corp.'s potential incentive and ability to temporarily withhold, or threaten to withhold, access to affiliated RSN programming to gain leverage over the terms of carriage. See *infra* ¶ 11. As noted above, because FSN-Ohio was already obligated under the terms of an existing contract to permit carriage of its affiliated RSN, the harms the RSN condition was intended to address do not arise here. *Id.*

⁵⁵ Pursuant to the arbitration condition, an MVPD's formal demand for arbitration must be filed with the AAA "no earlier than the fifteenth business day after the expiration of the RSN contract and no later than the end of the twentieth business day following such expiration." *News Corp.-Hughes Order*, 19 FCC Rcd at 677, Appendix F, Condition III.

⁵⁶ The Commission's preference for resolution of disputes by the parties is evident in the structure of the condition, which provides for a "cooling off period" during which the parties are expected to continue to negotiate toward a resolution of their dispute even after the MVPD has served notice on the RSN that it intends to submit a dispute to arbitration. See *id.* at 677, Appendix F, Condition III, 5th bullet.

⁵⁷ See *id.* at 476-77, 543, 544, 546-47, 547, 551-52, ¶¶ 4, 147, 153, 159, 161, 172. Because of this threat of programming withdrawal, the Commission provided for continued carriage of the RSN programming during the period of arbitration. Such carriage would be superfluous in cases where a vertically integrated programmer is already providing or contractually obligated to provide RSN programming.

⁵⁸ See *Massillon Opposition* at 9.

⁵⁹ *News Corp.-Hughes Order*, 19 FCC Rcd at 677, Appendix F, Condition III.

⁶⁰ *Id.* at 152, ¶ 173 (the Commission created "a mechanism whereby an aggrieved MVPD may choose to submit a dispute with News Corp. over the terms and conditions of carriage of RSNs to commercial arbitration to constrain News Corp.'s increased incentive to use temporary foreclosure strategies during carriage negotiations for RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN, and requires News Corp. to permit the MVPD to continue to carry the RSN while the dispute is being resolved").

established in the *News Corp.-Hughes Order* and the potential harms it was designed to address.⁶¹ To the extent parties seek to resolve disputes that fall outside the scope of the arbitration remedy set forth in the *News Corp.-Hughes Order*, judicial and other remedies, such as contract-based arbitration or litigation, may offer alternative avenues for redress.⁶²

12. Based on our *de novo* review of the record, therefore, we conclude that the arbitration remedy under the *News Corp.-Hughes Order* was not properly invoked by Massillon because there was a carriage agreement in place between Massillon and FSN-Ohio that did not expire until the end of 2008.⁶³

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and *News Corp.-Hughes Order*, 19 FCC Rcd 473, 677-679, Appendix F, Condition III (2004), the arbitration *Award* issued in the above-captioned proceeding is **VACATED** to the extent described herein.

14. **IT IS FURTHER ORDERED** that the *Petition for De Novo Review* filed by Fox Sports Net Ohio, LLC pursuant to the terms of the *News Corp.-Hughes Order*, **IS GRANTED**.

15. **IT IS FURTHER ORDERED** that, within 30 days of the effective date of this *Order*, Massillon must pay FSN-Ohio for the following: (i) any payments made by FSN-Ohio pursuant to paragraphs 5.a., 5.b., 5.c., and 5.d. of the *Award's* Grant of Relief; and (ii) Massillon's equitable portion of the administrative fees of the AAA and the arbitrator's compensation that FSN-Ohio has paid in satisfaction of paragraph 7 of the *Award's* Grant of Relief.

16. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William Lake
Chief, Media Bureau

⁶¹ See *Liberty-DIRECTV Order*, 23 FCC Rcd at 3296, ¶ 71 n.205 ("A dispute related to contract renewal may be submitted to arbitration only after the existing agreement has expired."); *Condition Removal Order*, 24 FCC Rcd at 8684, ¶ 17 ("News Corp.'s ability to temporarily or permanently foreclose an MVPD arises only upon the expiration of an MVPD's programming carriage [agreement] . . . or in connection with first time requests.").

⁶² In addition, parties may attempt to protect their interests prior to any disputes by, for example, including terms in their carriage agreement that provide for automatic rate adjustments in the event of a loss in programming. In this regard, FSN-Ohio notes that the parties' then-effective carriage agreement included no such price adjustment clause. *FSN Ohio Reply* at 6.

⁶³ In light of our disposition of the *Petition*, we need not address FSN-Ohio's request that the Commission designate its petition as a permit-but-disclose proceeding pursuant to Section 1.1206 of the Commission's rules. See *Petition* at 23.